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SUPREME COURT, UNITED STATES.

OCTOBER TERM, A. D. 1890.

THE GUARANTY TRUST AND SAFE DEPOSIT COMPANY,
Appellant.
vs.
THE GREEN COVE SPRINGS AND MELROSE RAILROAD COMPANY ET AL.,
Appellees.
No. 155.

BRIEF FOR APPELLEES.

J. C. Cooper
Solicitor for Appellees.

Start of Roll

In the Supreme Court of the United States.

THE GUARANTY TRUST AND SAFE DEPOSIT CO., Appellant,

vs.

THE GREEN COVE SPRINGS AND MELROSE RAILROAD CO. et al., Appellees.

For Appellees:

STATEMENT.

The appellant, by its bill filed November 30th, 1886, in the United States Circuit Court, Northern District of Florida, against the appellees (see printed record pages 117 to 154), set up that the defendant, the Green Cove Springs and Melrose Railroad Company, a Florida corporation, had theretofore, June 20th, 1882, executed to the appellant its mortgage, to secure the payment of certain bonds, of all its properties, etc., then, and thereafter to be, acquired; that said deed of mortgage was duly recorded in Clay county, Florida, and a copy of said deed is attached as an exhibit; that said mortgage deed shows that the bonded debt, so provided for, was in the aggregate $200,000, one hundred and fifty of the bonds being for $1,000 each, and the balance of the bonds, one hundred in number, being for $500 each, bearing interest semi-annually, at 6 per cent. per annum; the bill further shows "that said bonds or a considerable portion thereof, to-wit: $25,000 of such bonds, are outstanding and unpaid, together with the interest coupons attached thereto;" that said Green Cove Springs and Melrose Railroad Company was chartered to construct a line of railroad from Green Cove Springs, Clay county, Florida, to Melrose, in Alachua county, Florida, a distance of about thirty-five miles; that said company had graded about thirty miles of said line of road, laid iron rails for some ten or fifteen miles, put rolling stock thereon, and operated the same for some time, transporting freight and passengers; that said railroad company had lost the possession of its

railroad and properties of every kind to the defendants, who claimed to hold the same under and in virtue of a pretended sale thereof, made under certain judicial proceedings, made part of complainant's case by exhibits to its bill, had in the Circuit Court of Florida, in and for Clay county, on or about August 3d, 1885, and subsequently "discharged of the lien created by the said mortgage deed in favor of the bondholders thereby protected." The allegation of the bill is that the complainant was sought to be made a party defendant to the proceedings in the State Court by publication; but that the statute in that behalf was not complied with; and that the decree therein rendered was and is null and void; the alleged defect being that the publication was first made on the 9th day of August, 1884; the *order* of publication made by the Judge of the Third Circuit of Florida on the 29th day of July, 1884, and the *affidavits* of the printer, H. E. Bemis, as to the fact of publication, are made part of complainant's case, as Exhibit "C;" and the *order* of the Court adjudicating, "it appearing to the satisfaction of the Court from the affidavit of H. E. Bemis, business manager of the newspaper published in said Clay county, and called *The Spring*, that the order of publication of notice of suit made herein on the 29th day of July, A.D. 1884, has been published in said paper, once each week for four successive months, and one month having expired of the time thereby limited for appearance and answer by the above-named defendants," that is, the non-resident defendants, The Chester Construction Company and the Guaranty Trust and Safe Deposit Company, "and it further appearing to the Court that the said defendants have failed to appear, and are in default; therefore, upon consideration thereof, it is ordered, adjudged and decreed, that complainants' said bill shall be taken for confessed, and that said cause be proceeded in, *ex-parte*, as against the above-named defendants." "Done at Chambers in Jacksonville, this the 15th day of January, A.D. 1885." "James Baker, Judge," is made also a part of complainant's case, as Exhibit "D." See page 138 of printed record.

The appellant further sets up in its bill that there was no prayer in the suit in the State Court, in which appellant was so sought to be made a party by publication, for the foreclosure of

the mortgage; that said suit was commenced to enforce an alleged statutory lien for work and labor done on said railroad; and other irregularities are imputed to said "judicial proceedings."

The 19th paragraph of appellant's bill further avers "that the feeble defence and supineness and indifference to the interest of the said bondholders on the part of the Green Cove Springs and Melrose Railroad Company, its directors and officers, as shown by the said judicial proceedings in said State Court, if the same was intended to affect and destroy the lien of said deed of trust, was and is a fraud upon the rights of said Trustee and said bondholders; and your orator charges and alleges that said decree of sale and the sale thereunder and subsequent proceedings, so far as they were intended to affect and do affect said Trustee and bondholders, was fraudulent and should be vacated and set aside."

The prayer of appellant's bill is that a sale be ordered foreclosing said deed of trust for the payment of the outstanding bonds and coupons.

There is no allegation in the bill, as to the existence of any outstanding unpaid bonds or coupons save the $25,000 of bonds, hereinbefore mentioned.

There is no allegation in the bill that 60 per cent. of the holders of out-standing bonds, nor that any other proportion in the holdings of the holders of such out-standing bonds, nor that a single one of the bondholders, had invoked the appellant to take action in respect thereto; nor is there any allegation in the bill that there is a single outstanding bond *bona fide* held.

The Western Railway Company of Florida, Dexter Hunter, individually and as President of the said Western Railway Company of Florida, J. C. Greeley, Trustee, O. A. Buddington, W. J. Wilson, individually and as Buddington & Wilson, successors of the late firm of Buddington, Wilson & Co., making the usual reservations, answered the bill; and incorporated with their answer a demurrer, on the following grounds:

1. The complaint has not made or stated such a case as entitles it to the relief therein prayed or to any relief against these defendants or either of them.

2. The said deed of trust requires that 60 per centum in value of the holders of outstanding bonds should request in writing the said Trustees to initiate proceedings, and no such request is alleged in said bill.

3. Said bill does not disclose with sufficient certainty the identity of the bonds, either by number or ownership or denomination, sought to be collected by this action.

4. Said bill does not allege that the bonds so sought to be collected had passed into the hands and are now in the hands of *bona fide* holders for value.

The answer admits that the properties, upon which the alleged lien is sought to be enforced, have passed into the possession of the defendants, who claim to own them by virtue of the judicial proceedings and the sale thereunder referred to in the bill, discharged of the lien set up in the bill. They admit the complainant did not appear in the suit in the State Court, and was made a party thereto solely by publication in pursuance of the statute, which they aver was effective to make the complainant a defendant thereto. "As to when said publication was had, these defendants know nothing, other than what appears in said proceedings; but they allege the fact to be, as they are advised and believe, that publication bringing said complainant into court as defendant was duly had and made and duly published for the time required by law, as appears in the affidavit for the order, which was also duly made, the order itself, and the affidavit of the publisher, duly made and filed in said cause." These defendants further deny that there are any outstanding valid bonds provided for by said mortgage. They aver that all the *bona fide* holders of said bonds were invited in, and did in fact come in, to the proceedings in the State Court; and were allowed to establish, and did in fact establish, their said bonds as a lien upon said properties, and participated in the proceeds of said sale. They further say that as to the $25,000 of bonds, alleged in said bill to be outstanding, the payment of which said bill seeks to enforce and protect, these respondents are informed and believe, and so allege and aver on information and belief, that they are certain of the bonds put by said Green Cove Springs & Melrose Railroad Company in the hands of the Chester Construction

Company, as collateral to secure the said construction company in their claim against said railroad company, to be earned under a contract then existing in building and equipping said road; that said company utterly failed and refused to comply with their engagement in that behalf and utterly failed and refused to build and equip said road. Wherefore said bonds in the hands of the said Chester Construction Company were utterly valueless and incapable of being enforced against said railroad company, and the present holders of said bonds obtained them from said construction company with full knowledge of the facts herein set up." For answer of these defendants, see page 154 of the printed record.

Phillip J. Canova, a defendant, files a separate answer, in which he admits the ownership of an interest in the railroad properties, acquired under the judicial proceedings and sale thereunder set up in complainant's bill; denies that complainant has any such right or interest in said property, or power under said trust deed, as entitles complainant to any decree of foreclosure and sale; says that 60 per cent. of the holders of bonds have not requested this suit to be brought by complainant, and that complainant can only take possession and sell said property under the conditions and in the manner provided in said trust deed. That this defendant on the 23d of February, 1884, filed his bill in the State Circuit Court for Clay county, Florida, against the Green Cove Springs and Melrose Railroad Company, and the Chester Construction Company of Camden, New Jersey, to enforce the lien which this defendant was advised he had under the laws of Florida upon the property of the railroad company, for work upon the construction of the same by this defendant, and as a creditor's bill against said company; that the said company was then totally insolvent and unable to pay for the work upon its road, or the interest on its bonds; that the road and property were fast deteriorating, and two or three miles of said road remained to be finished to complete the first ten miles of same, to entitle said company to the lands granted to it under the laws of Florida; that said court took possession of the property of said insolvent railroad company on that day; that afterwards, July 25, 1884, Buddington, Wilson & Co., while the suit of said

Canova was pending, filed their bill in same court against said railroad company, the said Guaranty Trust and Safe Company, the Chester Construction Company, and this defendant P. J. Canova, to enforce their lien as holders of said mortgage bonds, and for labor performed on said road, by sale of said property to satisfy said bonds and interest and said claims; that an order of publication to the Guaranty Trust and Safe Deposit Company, as defendant in last-named suit, was duly made and published as required by law, and this defendant distinctly avers that said notice was published once a week for four months and one month besides said four months' publication elapsed before said bill was taken *pro confesso* against said Guaranty Trust and Safe Deposit Company. The answer of Canova sets up by recital the history of said judicial proceedings in the State Court, and further says "that every bond-holder had a full opportunity to come in and participate in said sale and its proceeds; that $66,040.60 did file their bonds, which were allowed, and thirty other bonds of defendant company, which were disallowed, and $18,446 of other claims were filed in said cause and the amount allowed the receiver for advances and his compensation, and have entered into and become part of the purchase money of and title of said property, including the lands in the purchase under said judicial sale, and if complainant was not made a party to said suits, which this defendant insists it was, that it is bound by said decrees and sale, and has no right in equity to set aside that sale or to resell this property without redeeming same by paying the amount of bonds and claims taken up in said sale or by allowing same to participate *pro rata* in any subsequent sale of said property on said bonds and claims as they were proved in said suits and are now on file in said court."

"This defendant, further answering, says that he is informed and believes and so charges that the bonds mentioned in said bill as outstanding, and to enforce which said bill was filed by complainants and which bonds have been filed in this suit by Messrs. Ambler & Taliaferro were originally filed with the master in the State courts in said causes of Buddington, Wilson & Co., and P. J. Canova vs. Green Cove Springs and Melrose Railroad Company et al., by the attorneys of the parties then claiming to be holders

of the same; and immediately after the sale of said property under the decree in said causes said bonds were, at the instance of said Taliaferro, withdrawn from said master's office and purchased at a nominal figure by said Ambler & Taliaferro from said attorneys of the parties who had filed the same with said master.

That part of said bonds, and part of the bonds of said railroad company now outstanding, were obtained from said company by the Chester Construction Company, of Camden, New Jersey, which company had the first contract to build said road, by deceit and misrepresentation and without any consideration, and that the parties from whom Messrs. Ambler & Taliaferro bought said bonds were members of said construction company or connected with same, and the remainder were never issued by the company.

That said construction company never carried out its contract and never built said road, but ruined same by its misrepresentations and failure to perform its contract.

That sometime previous to the sale of said railroad property by said master, Messrs. Ambler & Taliaferro sent their attorneys to Philadelphia and other places where bonds of said company were held, and investigated the title to same and made inquiries of the officers and members of the railroad company, and were acquainted with all the above alleged facts of the fraudulent and invalid claim of the parties holding said bonds to same, and said Ambler & Taliaferro bought said bonds with full notice thereof.

This defendant says that there are no valid outstanding bonds of said railroad company, but that the only bonds which were legally and properly outstanding were those adjudicated upon in the State Court of Clay county, Florida, in the claim above mentioned, and under the decrees in said suits this defendant and the purchaser of said property claim title thereto." The answer of P. J. Canova is found on page 237 of the printed record, and was sworn to and filed February 24, 1887.

The motion for a temporary injunction made on behalf of complainant, the Guaranty Trust and Safe Deposit Company, was denied, but the demurrer was ordered to be taken from the files. (See interlocutory order, page 160.)

The general replication was thereupon filed by complainant. (See page 161 of the printed record).

On the 23rd of December, 1886, an order was made *on motion of complainant*, referring the cause to the master to take testimony, who was further directed to publish a notice, notifying all persons who claim to be an owner or holder of any of the bonds or coupons, that they may file the same with the master on or before February 1st, 1887. And it was ordered that "upon the filing of any of said bonds or coupons with the master, any party to this suit and any person who shall have filed, with the master, any of said bonds or coupons shall have the right, upon notice to the other persons or parties in interest, to take testimony before the said master or otherwise touching all questions as to whether or not such bonds or coupons are *bona fide* owned or held by the party or persons claiming to be such owner or holder or are outstanding obligations entitled to share in any funds that may be brought into court or arise in said cause.

The master is further instructed to make no findings of fact or law upon any issue made before him, the decisions of all questions of fact or law being hereby reserved for further consideration." (See 162 of printed record.)

On the 31st of December, 1886, Ambler & Taliaferro filed, through their solicitor, H. Bisbee, with the master, the following bonds of the Green Cove Springs & Melrose Railroad Company, to-wit: "Nos. 4, 17, 83, and 85 to 91, inclusive, for $500 each; Nos. 18, 21, 22, 68, 124 to 128, inclusive; 131 to 134, inclusive; 137, 138, 140, 148, 149, for $1,000 each, which they pray may be received and filed in said court and share in the funds that may arise in said cause." (See page 163.)

On January 17th, 1887, the master entered the following:

"Pursuant to notice, this day the complainant appeared before me, at my office, by H. Bisbee, Esq., his solicitor, and respondents by A. W. Cockrell & Son; and thereupon the complainant announces to the master and desires it to be entered of record that the complainant has no testimony to offer beyond that already found in the pleadings and exhibits. This without prejudice to the right of complainant to adduce any testimony in reply to any testimony that may be adduced by the respond-

ents; also without prejudice to the complainant in presenting to the court or filing with the master any bonds or coupons of the G. C. S. & Melrose R. R. Co., which may come to the complainant's possession or control. The complainant here rests." (See page 164 of record.)

It was stipulated by the solicitors of the respective parties, that the original pleadings, proceedings and record in the State court in the case of Wilson, Buddington et al. vs. G. C. S. & M. R. R. Co. et al., mentioned in the bill and answer, may be read in evidence by either party to this suit as deemed necessary by such party. Filed February 14, 1887, page 223. Further stipulation of same character, March 21, 1887, was filed as to the papers in the case of P. J. Canova vs. G. C. S. & M. R. R. Co., in the State court; page 248 of record.

A number of witnesses were also examined before the master, whose testimony is found on pages 164 to 219 of the record.

The cause was submitted by the parties, for *final* decree, on the stipulation of counsel, and the records thereunder introduced, copied into the transcript, and the evidence reported by the master; and the court, Hon. A. Pardee, Judge, dismissed complainant's bill, and complainant appeals. See page 248 of record, for final decree.

ARGUMENT.

It is clear the appellant can predicate no error in the decree dismissing its bill, if,

1. Complainant by its bill did not make a case entitling it to relief; nor,

2. Can it complain if having stated a case entitling it to relief, it failed to prove the case stated.

First—No case is stated in the bill.

Sixty per cent. of the holders of the bonds had not requested any action on the part of the Trustee as required by the Trust Deed, pages 25 and 26 of the record; this objection is also raised by Canova in his answer, page 237 of the record). This ground of demurrer is sustained by the case of Railroad Company vs. Fosdick, 106 U. S., 47. The appellant, plaintiff below, had stated in his bill that there were $25,000.00 of the bonds outstanding,

but did not state that 60 per cent., or any other proportion of the holders of bonds, had requested any action by the Trustee. There were in fact only $23,000.00 of bonds filed with Philip Walter, Master, in this case in the United States Circuit Court for the Northern District of Florida, to-wit: those filed by Ambler & Taliaferro, so that plaintiff below as Trustee was not, nor was it shown to be in its bill, in position under the terms of the Trust Deed to bring this suit or take any action, and even if the bill was not dismissed upon the demurrer, it was properly dismissed on the final hearing, when the evidence showed only $23,000.00 of the bonds filed, all of the balance of the holders of the bonds, *bona fide* outstanding, being satisfied with the condition of the title of the property as it stood before complainant commenced its said suit in the United States Circuit Court for the Northern District of Florida.

The Supreme Court of the United States in a recent case decided November 24th, 1890, reported page 61 Supreme Court Reporter, Vol. 2, No. 4, December 15th, 1890, entitled Morgan's L. & T. R. & S. S. Co. vs. Texas Central Railroad Company, distinguished that case from the case of Railroad Company vs. Fisdick, 106 U. S. reports, page 47, because the mortgage provided that nothing in that instrument should be construed to prevent or interfere with the foreclosure by any Court of competent jurisdiction, and in the case at bar the mortgage or Trust Deed, found on page 24, 25 and 26 of the printed record, provided that the Trustee could only proceed at the request of 60 per cent. of the bondholders.

Again, we submit, that no case is stated unless the bill shows a state of facts, which, as matter of law, makes null and void the proceedings in the State Court, set up in the bill, under which the property passed by judicial sale to the defendants. And in determining by construction the legal effect of the averments of the bill, it must be presumed the appellant made the strongest presentation, consistent with the facts, of the grounds upon which to assail the validity of the decree of the State Court.

1. It is an axiom of the law, that when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it.

2. When the proceeding is "in rem," the seizure of the property proceeded against is the foundation of the court's jurisdiction; and defective or irregular affidavits and publications of notice, though they might reverse a judgment in such case for error in departing from the directions of the statute, do not render such a judgment, or the subsequent proceedings, void. Cooper vs. Reynolds, 10 Wall., 308.

The proceedings in the State Court, assailed by the appellant's bill, as null and void, were not instituted to have adjudicated a personal liability of the appellant; the purpose and scope of the proceedings, and the result of the judgment therein pronounced, were to enforce liens created by statute, for work and material put upon the "rem" confessedly within the territorial jurisdiction of the court, and to foreclose a mortgage thereon in favor of the creditors protected thereby. Speaking to this point, this court in Pennoyer vs. Neff, 95 U. S., 734, says:

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

At the time the bill of Buddington, Wilson & Co. was exhibited in the State Court, July 2d, 1884, the railroad properties were in the possession of the Court, through its receiver, Dexter Hunter. This is distinctly set up in the bill of Buddington, Wilson & Co., in the 9th paragraph; that the Court did in fact then have the possession of this property is abundantly established by the recorded proceedings, made part of the pleadings in this case. See order appointing Receiver, page 7 of record, dated February, by 23, 1884. We submit, as the *rem* proceeded against was in fact seized by the process of the Court, at and before the bill of Buddington, Wilson & Co. was filed, *that* seizure,

and not the affidavits and publication of notice, is the foundation of the Court's jurisdiction to deal with that property; and that errors subsequent to the jurisdiction attached by the seizure, cannot avail to support a collateral assault. No matter how irregular and erroneous the proceedings may have been in that suit, in the State Court, they are beyond the reach of the United States Circuit Court to correct, at the expense of the title to the property passed thereunder. Hence the appellant's bill was properly dismissed.

The provision for process by publication in Florida, was enacted November 7th, 1828 (see sec. 13, Act November 7th, 1828), and continued, without the slightest modification, substantial or verbal, down to the 12th day of February, 1885 (see Session Acts 1885, p. 27, ch. 3589), and is as follows:

"Whenever it shall be made to appear by affidavit to the Judge of the Court in which a bill shall have been filed, that any defendant therein resides out of the circuit of the State in which the bill is filed, an order requiring such defendant to appear and answer, otherwise the complainant's bill shall be taken *pro confesso*, shall be published in any newspaper printed in the circuit of this State in which the bill is filed, for the time herein prescribed; that is to say, if the defendant resides in this State, but not in the circuit in which the bill is filed, for two months; if in any other part of the United States, for four months; if in any of the West India Islands, for six months; and if in Europe, for nine months; which publication shall be made, when the defendant resides in the United States, once a week; and when he or she resides out of the United States, once a month during the periods above prescribed; if no newspaper be published in the circuit in which the bill is filed, publication of the aforesaid order shall be made in any other newspaper published in the State adjoining the circuit in which the bill shall be filed; in which last case, in addition to such publication, the said order to appear and answer shall be posted up at the court-house, in which the Circuit Court for the said circuit holds its sessions; and a copy of such order having been published in the manner and for the time prescribed by law, and one month having expired of the time thereby limited for appearance and answer by

the defendant, upon proof thereof by affidavit to the Judge of the Court in which the bill is filed, an order, that the complainant's bill may be taken *pro confesso*, shall be granted, and entered in the common rule book kept by the clerk; and the complainant may either have the matter of the said bill decreed, or he may obtain a commission or commissions for taking testimony, and have a decree upon his bill as confessed, and the testimony adduced by him, in the same manner as if the cause were at issue."

The affidavit upon which the order of publication was based, the order itself, and the recitals in the decree, ordering the bill taken as confessed against the non-resident defendants, are by the appellant made by exhibit a part of its bill assailing the proceepings in the State Court.

As we understand the position of complainant, the accuracy or fullness of the affidavit, in respect of its conformity to the statute, is not called in question; nor is the sufficiency or accuracy of the order made by the Court thereof assailed; nor has any defect been pointed out in the recitals of the decree under which the non-resident defendants are defaulted. The contention of the appellant is based upon the proposition that four calendar months did not in fact intervene between the date of the first publication of the order and the rule day, the first Monday in December, 1884, at which the non-resident defendants were required to appear and answer. And in support of this proposition, the bill alleges and appellant contends that the first publication day was August 9th, 1884. Our reply to this contention is to join issue both on his proposition of law and proposition of fact; we say, as matter of law:

1. The foundation of the jurisdiction in the State Court for this proceeding in *rem* is the seizure of the *rem* within the territorial jurisdiction of the Court; that the State Court acquired jurisdiction to do what it did, not by the affidavit and publication, but by the seizure.

2. If this were not so, the recitals in the decree that the publication was duly published, must be received as evidence, and is conclusive, as against this collateral assault, that the statutory requirements were in fact complied with; and that the

appellant was made a party defendant to the suit of Buddington, Wilson & Co. For decree taking the bill *pro confesso* against appellant, see page 40 of record.

Craig vs. Lebrell, 9 Grat., 131.

Hill vs. Woodward, 78 Va., 765.

And as matter of fact :

1. The burden was upon the appellant to show affirmatively, under the issues raised by the pleadings, that the first publication of notice was made on the 9th day of August, 1884, and that, as matter of fact, no such proof was made by appellant. There is nothing whatever in the cause to support appellant's contention that this notice was not in fact published for four months, and the State Court distinctly found and adjudged that it had been published for four months.

But suppose we concede to the appellant that the recitals in the decree are not conclusive, and, for the sake of the argument, that the first publication day was, as was asserted in its bill, on the 9th day of August, 1884, the questions recur:

1. What is the meaning of the word *month*, as it is used in the statute, prescribing the period of time required for bringing parties defendant into court by publication? The argument of appellant's counsel concedes the publication was continued four lunar months; but he insists the statute contemplates calendar, not lunar months. In determining this question it must be constantly kept in mind, the statute was passed in 1828, and the legal conception of time, as it obtained then, not the legal conception that obtains now, is the only safe guide in reaching the meaning of the Legislature which prescribed the period. At that date the common law had become so interwoven with our social, political, legislative and judicial life, that the Legislature, in the session of 1824, December 23, had found it necessary "To secure the rights to property of husband and wife derived previous to the cession of the Provinces of Florida to the United States," to pass an Act, based on the following preamble:

"WHEREAS, Some doubts have been entertained as to the effect and operation of the introduction of the common law of England upon the separate rights of husband and wife under the

laws of the Provinces of East and West Florida upon marriages, solemnized before the change of government, to obviate any doubts in future,

Be it enacted by the Governor and Legislative Council of the Territory of Florida, That all the rights and privileges of husband and wife, established or derived by marriage under the civil laws of Spain, while this Territory was under the jurisdiction of that government shall be held, possessed and exercised by the husband and wife respectively in this Territory, and each shall be permitted to sell, succeed to, dispose of, and convey by sale, devise or will, their goods, chattels, lands and tenements, in the same manner as they could or might have done under the laws of Spain, observing only the formalities of conveyance required by any other laws established in this Territory.

"Approved 23d December, 1824.

"Laws of the Territory of Florida, passed prior to October, 1828, now in force," page 23.

The common law was then in the minds of the Legislature the webb and woof of our system of government, notwithstanding the Territory had been prior to the cession under the jurisdiction of the laws of Spain. A more conclusive evidence of the sense of the Territorial Legislature, that prior to 1824 the system, known as the common law, had so fully permeated and vivified our institutions as to displace every other system and trace or parts of systems, can scarcely be conceived.

The Sections of the Act bearing immediately on the point, are (13 and 16) thirteen and sixteen, Acts 1828, pp. 84 and 85. As the non-resident defendants resided out of the State and in the United States, the Act as to them provides the "order requiring" them "to appear and answer," otherwise the bill shall be taken as confessed, "shall be published once a week" for "four months;" "and one month having expired of the time thereby limited for appearance and answer," an order that the bill shall be taken *pro confesso*, shall be granted.

Section 16, Act 1828, p. 85, provides that notwithstanding the factum of publication, the defendant may "at any time before the bill is taken for confessed or afterwards with the leave of the court demur or plead," etc. The question is, what did the

Legislature of 1828 mean when it prescribed a publication "once a week" for "four months?"

In England, before the 18th day of November, 1847, when the word "month" was used in a statute, without the addition of "calendar" or any other words to show the Parliament meant "calendar," it was understood to mean a lunar month.

Lacon vs. Hooper, 6 T. R., 224; 1 Esp., 246.

In legal matters, a month means a lunar month, Hart vs. Middleton, 2 C. & K. 9; Attorney-General vs. Newberry, 1 Coop., 353. This was changed by 13 and 14 Vic., Ch. 21. For shortening the language used in the acts of Parliament, the word "month" is by the interpretation clause, Sec. 4, to mean "calendar," unless words be added to show "lunar" months to be intended.

Since the passage of the Florida Act, the common law meaning of the word "month," importing a "lunar" month, has been changed, not by judicial action, but by statute law, in the following States as noted:

New Hampshire, chap. 1, sec. 8, General Laws 1878.
Massachusetts, chap. 3, sec. 3, Public Stat. 1882.
Maine, chap. 1, sec. 6, Rev. Stat. 1883.
Vermont, sec. 12, Rev. Laws 1880.
Rhode Island, chap. 24, sec. 11, Pub. Stat. 1882.
Connecticut, title 22, chap. 9, Revision of Laws 1875.
New York, chap. 19, title 1, sec. 3 and 4, Banks & Bro. Rev. Stat.
New Jersey, sec. 10, Statutes, Revision of 1877.
Indiana, sec. 240, Rev. Stat. 1881.
Illinois, chap. 131, sec. 1, Cothran's Ed. Stat. 1883.
Michigan, sec. 2, Howell's Annotated Stat. 1882.
Wisconsin, sec. 2578, Rev. Stat. 1878.
Iowa, sec. 45, Miller's Rev. Code 1880.
Minnesota, chap. 4, sec. 1, Gen. Stat. 1878.
Kansas, chap. 80, sec. 720, Dassler's Com. Laws 1879; applies only to construction of the Code.
Delaware, chap. 5, sec. 1, Rev. Code 1874.
Virginia, chap. 15, sec. 9, Code of 1873.
West Virginia, art. 143, sec. 14, Bien. Law 1882.

North Carolina, sec. 3765, Code 1883.
Kentucky, chap. 21, sec. 7, Gen. Stat. 1873; and sec. 732, Bullitt's Civ. Code.
Tennessee, sec. 50, Mill & Vertrees' Code 1884.
Missouri, sec. 3126, Rev. Stat. 1879.
Arkansas, sec. 6359, Man. Dig. 1884.
Texas, sec. 3138, Rev. Stat. 1879.
California, sec. 5014, Hittell's Civ. Code.
Colorado, sec. 405, Civ. Code of 1877.
Washington Territory, sec. 759, Code 1881.
Dakota, sec. 2123, Levisee's Codes 1883.
Idaho, sec. 11, Civ. Code 1881.
Montana, sec. 149, Gen. Laws.
Georgia, sec. 5, Code 1882.
Alabama, sec. 8, Code 1876.
Mississippi, sec. 12, Code 1880.
Utah, sec. 11, Civ. Code Proc. 1884.
Arizona, sec. 3, Compiled Laws 1877.

In Loring vs. Halling, decided in 1818, it was held (15 Johns., 119-20) by the Supreme Court of New York, in determining the period of public notice to be given, in the exercise of a power, in pais, of sale in foreclosing a mortgage, where the Act (1 N. R. L., 374) required that notice should be inserted "once a week" for six successive months, previous to the day of sale, that the requirement was satisfied by a publication continued for twenty-four weeks, that is six lunar months. Chancellor Kent in Stockhouse vs. Halsey, 3 Johns. Chy. Cases, 74, decided in 1817 had made the same ruling. So in Jackson vs. Van Valkenburg, 8 Cowen, 260, Judge Woodwork, in February, 1828 (our statute having been passed in November of that year), in construing Ch. 245, Sec. 1, declared the foreclosure irregular because "there was not a notice of six lunar months." It is true, Judge Nelson, in 1833, The People vs. The Mayor of New York, 10 Wend., 395, in construing the word "month" as used in the statute concerning the assessment and collection of taxes in New York city, passed in 1816, held that it meant calendar and not lunar, but he rescued the Legislature from using the word "month" as a "lunar" month, by declaring, "as the one period

in express terms is calendar time, and the six months immediately succeed it, and were intended to include a part of it, it should be construed to mean the same, otherwise we must believe the Legislature intended to fix the different periods by different calculations of time in the same breath, and on the same subject matter, and without any conceivable purpose." At the same time he states the rule to be that month means lunar and not calendar in the absence of added words showing a different legislative intent. In the Florida statute of November 1, 1828, there is no language indicating that calendar months were intended. On the other hand, the entire context shows that lunar was intended. So far from calendar time being expressed as in the case in 10 Wend., 398, the publication is in terms required to be made, as to those who are to be brought in as defendants, in, respectively, two and four months—that is, residents of the United States, "once a week" for four months, conditions wholly inapplicable to calendar months, which are not susceptible of divisions into "weeks."

The legislative power of Florida, by which alone the rule of the common law can be changed, has never been exerted in the direction of declaring that the word "month," when used in a statute, shall mean calendar month. Nor have the courts of Florida, in any instance, held that the word "month," as used in the statute, bringing non-residents into court by publication, means any thing but "a common law" month, a "lunar month," nor does the case of Bacon vs. The State. 22 Florida, 47, interpreted in the light of Sheets vs. Selden, 2 Wall., 177, upon which it is based, construing a recent rule of court, conflict with this view. And the inquiry further demands solution if a change is wrought in the meaning of the word "month" as that word was understood when the statute was passed November, 1828, and this change is effected by *judicial* as distinguished from legislative action, at what period of time must this change be held to have been accomplished?

The case of Bacon vs. The State, 22 Florida, page 47, does not decide that under a statute passed, as this act of constructive service was, in 1828, that the word month means "calendar month." It simply decides that an order of the court extending

the time to prepare bill of exceptions for three *months*, under a rule of court which was made in *1873*, would be construed to mean "calendar months," but the court distinctly says that they hold this because nothing in the order indicates the contrary. But in the statute for constructive service the language is "once a week for four weeks," which means clearly a month, divisible into weeks, or a lunar month.

The case of Sheets vs. Seldon, 2nd Wallace, 177, was upon the construction of a lease under the statue law of Indiana, where the Legislature has prescribed that the word month shall mean calendar month when used in the statutes of the State, so that neither of these authorities support appellant's contention in this case.

We insist, therefore, the period prescribed for publication of notice bringing in non-resident defendants, residing within the United States, is sixteen weeks, that is four lunar months, one hundred and twelve days; and that this interval and more elapsed between the 9th day of August, 1884, the alleged first day of publication, and the —— day of December, 1884, the first Monday in December, 1884, to which the said non-residents were cited to appear and answer.

Suppose the statute does *not* really mean one hundred and twelve days' notice by publication, but means four calendar months, and the State Circuit Court in fact erred in determining that the required statutory period had elapsed, does it belong to the jurisdiction of the United States Circuit Court for the Northern District of Florida, to review and correct this error, in this collateral way, at the price of disturbance or displacement of title acquired at a judicial sale?

We submit that the construction of the meaning of that statute, as applied in that case, was within the jurisdiction of the State Court to determine; and that determination, however erroneous it may have been, was not open to inquiry in *this* suit.

If, as we contend, this decree *pro confesso* is regularly taken as appears of record herein, the only other question raised by appellant on the proceedings in the State Court, is whether the decrees of February 6th, 1885, page 103, printed record, consolidating said suits and decreeing that said non-resident defend-

ants were in default; and of June 4th, 1885 (finding certain liens and ordering the sale of the property and calling in the claims and bonds), were justified by the pleadings in the two causes.

Under the bills in causes of P. J. Canova *vs.* Green Cove Springs and Melrose Railroad Company *et al.*, the sale was made to satisfy and enforce Canova's laborer's lien, and also Buddington, Wilson & Co.'s bonds as a bondholder of bonds of the Railroad Company, also Buddington & Wilson's labor liens.

The Court below found and adjudged that P. J. Canova had a laborer's lien for $3,526, and that was sufficient to draw the property into a Court of Equity for benefit of all lien holders; this being a creditor's bill for the benefit of all lien holders.

Buddington & Wilson were also decreed laborer's lien of $143.67 and a number of other laborer's liens, besides judgments and bonds were declared liens on the bonds.

For laborers' liens see:
McClellan's Digest, p. 730, Secs. 41–2.

The bill of Buddington, Wilson & Co. was not only a bill to enforce their alleged lien for labor on the road, but as bondholders to enforce the payment of the principal and interest of $17,500 of full value of bonds of said Company. The interest not having been paid on the bonds, any bondholder, on failure or neglect of the Trustee to institute proceedings to enforce collection of said interest, may bring suit to enforce same by sale of the property, and the Court selling to enforce payment of interest to prevent further litigation or holding the funds in Court, or turning them over to the debtor, will proceed to pay the principal also of the bonds of such bondholders as have come into the suit.

Where such a suit is brought by a bondholder on behalf of himself and all other holders or creditors, and all are given an opportunity to come in and participate in the proceeds, all bondholders are quasi parties and bound after decree of sale and distribution.

Campbell *et al. vs.* R. R. Co.
1 Woods' Reps., 376, 377.
Story's Equity Pleadings, Sec. 94–96.
3d Dillon, 489; 11 Wallace, 459.

We insist the procedure and results in a suit of a bondholder are the same whether the Trustee is a party or not, because it is a suit of one of a class of creditors for all, and against their common debtor to enforce their joint lien on same property.

The claim of Buddington & Wilson to liens for labor was also established and decreed by the Court below.

These labor liens are of prior dignity under the statute, to all liens, and this law existed before the mortgage or bonds were executed and therefore is the law of the contract, and parties buying bonds take them with notice of it.

The bill of Buddington, Wilson & Co. was sufficient in its prayers and allegations to found a decree in favor of them and all bondholders to enforce the trust deed as a mortgage under the laws of Florida.

What is a mortgage in Florida, and how the title of mortgagor is divested by judicial proceedings is set out in McClellan's Digest, pages 765–6, sections 1, 2, 3.

They are simple liens to be enforced by decree of sale; the legal and equitable title remaining in the mortgagor, until the lien is executed by a sale under the decree of the Court.

Sayre *vs.* Jordan, 24 Fla., page 1; 9 Cal., 365; 21 Cal, 609; Pom. Eq., vol. 3, p. 159, sec. 1188, and notes.

We contend that the sale under the decree of the Court below was in all respects regular; an inspection of the record will show two bills filed—one by P. J. Canova, is to enforce labor lien, secured by bonds as collateral; and the other by Buddington, Wilson & Co., to enforce labor lien and bonds; these suits consolidated, full notice to all creditors, testimony taken, property advertised and sale regularly made.

The bill of P. J. Canova sought to enforce his laborer's lien secured by bonds as collaterals. He was finally found to have laborer's lien of $326, and to be the holder of a large amount of bonds as collaterals (see Master's report), and his bill was taken *pro confesso* against Chester Construction Company. This drew the cause into equity and the Master's notice to all class of creditors would have made sufficient cause to justify the sale, even upon this suit.

But the bill of Buddington, Wilson & Co. was to enforce laborer's liens and bonds, and undoubtedly justified the decree of sale.

Counsel for appellant would make it appear that the decree of June 4th, 1885, only recites the finding of $200 of laborer's liens due Buddington & Wilson, and judgment of $1,072.50 due O. A. Buddington on their interventions that this decree was made on a pleading to which Guaranty Trust and Safe Deposit Company were not parties and of which they had no notice.

This is not the condition of this decree, it was not made on new or amended pleadings.

The bills of both P. J. Canova and Buddington, Wilson & Company were creditor's bills for themselves and all others in like situation. The petition of Buddington, Wilson and O. A. Buddington was simply other creditors of like kind coming into a common cause, the admission of the defendants by the *pro confesso* would cover the cases of all creditors coming in and proving their claims, to the satisfaction of the court, even after *pro confesso* is taken; therefore the findings of these liens was not making a decree on new pleadings.

But the decree was also based on the facts as found, that Buddington, Wilson & Co. were the holders and owners of certain of the bonds of the said railroad company as set forth in their bill of complaint, which said bonds are secured by first mortgage on said railroad, etc. (reciting the property), and that bill of P. J. Canova had been taken as confessed, that the railroad company was utterly insolvent and had been made default in payment of all interest due on its said bonds so secured by said first mortgage since July —, 1883, and road was in hands of a receiver.

It was upon this condition of things that court ordered the sale of the property to prevent expenses of keeping and preserving same, and at the same time ordered the taking account of all claims, liens, bonds, etc., which was done.

The appellant attacks all the proceedings in the State Court. If the decrees *pro confesso* were regularly taken, these grounds of appeal cannot be heard, as the party against whom *pro confesso*

has been taken can only have reviewed the question as to whether the decree conforms to the pleadings.

In dismissing the bill, upon the issues raised upon this record, after assuming jurisdiction to enforce the alleged lien of outstanding bonds, the court below adjudicated there were no valid bonds outstanding in the hands of *bona fide* holders. We contend this adjudication is abundantly supported by the evidence. Let us consider.

The bill alleges that the bonds were issued and secured June 20, 1882, and that "the said Green Cove Springs and Melrose Railroad Company has not kept and performed any of its covenants on its part in the said deed of trust contained, but has broken and violated each and every one of said covenants. The said company has not paid the interest coupons on its bonds which accrued due January 1st, A. D., 1884, nor any part thereof, nor upon any of the coupons of said bonds which have accrued since the date last aforesaid, but the same remain unpaid and unsatisfied, and the right of the grantee in said deed to take possession of said railroad and the property described in the said deed and sell the same for the benefit of the holders of said bonds has accrued and become vested in said grantee, and that said bonds or a considerable portion thereof, to-wit: twenty-five thousand dollars of such bonds, are outstsnding and unpaid, together with the interest coupons attached thereto, and the aggregate amount of said bonds originally issued was two hundred thousand dollars."

As these bonds run for twenty years, and the principal matured, in the absence of default, July 1, 1902, semi-annual interest instalments were represented by forty coupons attached to each bond.

The bonds presented by Ambler & Taliaferro are set forth in the record as follows:

"Nos. 18, 21, 22, 68, 124 to 131, inclusive, 132, 133, 134, 137, 138, 140, 148, 149, of the denomination of $1,000 each, and Nos. 17, 4, 83, 85, 86, 87, 88, 89 and 90, of the denomination of $500, with interest coupons due thereon on January 1, A. D., 1884, and which have become due since that date."

The testimony of J. C. Marcy, from whom, through J. T. Walker, their attorney, Ambler & Taliaferro purchased the bonds they presented for allowance, introduced as a witness by Ambler & Taliaferro, p. 191 of record, shows that these bonds were sold to them, on the day of the sale of the railroad properties, under the decree of the State Court, and after the parties attending the sale, including the said John T. Walker, had returned from Green Cove Springs where the sale was made, to Jacksonville. The testimony of J. C. Cooper, page 180, also gives the history of the acquiring of these bonds. This sale was made August 3, 1885; and the bonds so purchased by Ambler & Taliaferro were produced under the order of the court referring this cause to the master, entered by Judge Settle December 23, 1886. (See record, 162--163, under paragraph 4 of that order).

The testimony of J. C. Marcy, and the testimony of John T. Walker and the testimony of J. C. Cooper and R. W. Davis, show the circumstances under which, and the price for which, these bonds with coupons attached were acquired by Ambler & Taliaferro, and exhibits full knowledge on the part of Ambler & Taliaferro, and their agent and attorney, John T. Walker, of the defects in the title to the bonds, and defeats their claim to hold them *bona fide*. What are these circumstances:

1. At the time they purchased, the property pledged to secure these bonds was in the possession of the State Circuit Court; and the liens upon it, including the liens of these bonds, were being adjudicated by the court; and the road and properties were sold, under the order of the court, to satisfy these liens, on the day Ambler and Taliaferro bought them, by paying for $23,000 face value of the bonds, only $3,450 (see Marcy's testimony, p. 191 of the printed record), an amount not exceeding the sum total of the past due coupons attached to the bonds and sold with them.

2. There was delivered to J. T. Walker, the agent of the purchasers, along with the delivery of the bonds, an affidavit, as follows:

"STATE OF PENNSYLVANIA, }
"COUNTY OF PHILADELPHIA. } *ss:*

"Before me, the subscriber, a Commissioner for the State of Florida, here resident and duly appointed and bualified, personally appeared Thomas S. Harris, who, being duly sworn, doth depose and say that he is the *bona fide* holder and owner of the bonds accompanying this affidavit of the Green Cove Spring and Melrose Railroad Company, and that he acquired the same for value and without notice that the said bonds were issued improperly and without any valuable consideration moving therefor to said railroad company.

"THOMAS S. HARRIS."

"Sworn to and subscribed before me this twenty-ninth day of July, A. D., 1885."

"SAMUEL L. TAYLOR,
[SEAL.] "Commissioner for Florida in Pennsylvania,
"518 Walnut Street, Philadelphia.

"Said bonds numbered respectively Nos. 18, 21, 22, 68, 124, 125, 126, 127, 128, 131, 132, 133, 134, 137, 138, 140, 148, 149, all of $1,000 each; also Nos. 41, 17, 83, 85, 86, 87, 88, 89, 90 and 91, of the denomination of $5,000.00 each."

To this point Marcy swears: "I want to make one statement with regard to the memorandum on the margin. I wish to state, if I have not already stated it, that the numbers and denominations there made are the numbers and denominations of the whole $23,000.00 sold, as above stated, to Messrs. Ambler & Taliaferro through Mr. John T. Walker.

"The sale of the bonds took place in Jacksonville, Duval county, at the National Bank of the State of Florida, that is, the sale was consummated there. It had been talked about some time before. I would not like to fix the time; not long before Mr. Greeley and I had talked about them, and Mr. Walker also; there was $9,000 I did not sell; I was not authorized. These belonged to Dunn Bros.

"I delivered this affidavit, with the bonds, to the purchasers, that is, I suppose I did. The time the bonds were found it was with them. I don't especially recollect now. It would be almost impossible for me to state whether Mr. Walker saw the af-

fidavit when he bought the bonds, but I suppose he did, as Mr. Walker is a prudent man and would not buy them without, I suppose—that is, without seeing the affidavit—that is, under the then peculiar case, as an order had been made by the special master touching the *bona fide* ownership of bonds and some question had been made about it. I mean as to bonds generally, not as to these bonds."

This witness speaking of a trip he made with Mr. Walker, and at the request of Mr. Walker, to aid him, as the representative of Ambler & Taliaferro, further says: "The purpose of going, as I understood it, was to see how many bonds were outstanding, how they were held, by whom they were held, and ascertain at what price they could be purchased."

"Q. Whom did you represent?"

"A. I went with Mr. Walker to aid him in his investigation, and was employed by him and paid by him. He mentioned Ambler & Taliaferro and Alex. Wallace and others as persons that he represented. The affidavit referred to was sent along to enable me to comply with the order of the master or sell the bonds as I saw fit. I did not deem it necessary that there should be an affidavit to sell the bonds." (See pages 194–5 of the record.)

In answer to the question: How long had you known Mr. Harris? Marcy says: "This first time I met Mr. Harris, I met him in Philadelphia, at the time I went with Mr. Walker, some time before the sale by the special master of the Green Cove S. & M. R. R. I had had correspondence with Mr. Harris for a iong while before."

In answer to the question by complainant: "At the time you sold these $23,000 of bonds, had you any knowledge that they were a part of $25,000.00 of bonds that had been in the hands of Shreve Ackley?"

A. "I had no such knowledge, suspicion, or thought, nor do I know it now except by mere rumor, nor did I even hear of that rumor until many months afterwards."

Mr. Taliaferro, examined on his own behalf, was asked:

Q. "State whether or not prior to the sale you contem-

plated being a bidder, and if you had made arrangements to bid on the property and to what amount."

A. "I had gone through the country over the line of road, and had made up my mind that it would be a desirable purchase in connection with our timber interests. I returned to Jacksonville. Mr. Alexander Wallace was with me when I made the examination, and we employed Col. John T. Walker to investigate the subject of the title to the property and how a legal title could be acquired. In this way he came to require into these bonds. After investigating the matter for some weeks he told us that he thought it advisable to buy up these outstanding bonds. Acting under that advice, we authorized him to go to Philadelphia and endeavor to purchase these bonds."

It thus clearly appears that prior to the sale, and with reference to being a bidder thereat, and with reference to the acquisition of the legal title, Walker was employed to investigate, and after investigation, reported that he thought it advisable, with a view to the acquisition of the title, that *these* outstanding bonds be bought up. And that acting under *this* advice, Ambler & Taliaferro authorized Walker to go to Philadelphia to purchase "these bonds."

Walker testifies that in pursuance of this employment, retained as he was prior to the sale, made by the State Circuit Court, and with reference to his clients' bidding thereat, with the view of the acquisition by them of the legal title to the railroad properties, the line of which they had examined, and the purchase of which they had ascertained was "desirable in connection with our timber interests," he got possession, through the officers of the railroad company, of the bond statement of the company, as follows:

"BOND ACCOUNT.

"H. K. Thurber (to secure debt for iron rail)	$ 35,000.00
"R. B. Canova	11,500.00
"Buddington, Wilson & Co	18,000.00
"Dexter Hunter	25,000.00
"Shreve Ackley	25,000.00
"C. Construction Company (held by members)	85,500.00
"Total	$200,000.00"

(See page 219 for bond account, and page 205 for Walker's testimony.)

Equipped with this statement, Walker proceeded with Marcy to Philadelphia. "There we met Mr. Harris, who held some of the bonds; I don't remember how many. Through him, according to my recollection, Mr. Dunn was introduced to me. The Philadelphia investigations were conducted principally through Mr. Dunn and Mr. Harris. With Mr. Marcy's assistance I ascertained all the facts touching the *bona fide* holding of the bonds in Philadelphia. The evidence satisfied us that all the bonds were purchased in good faith, and I authorized Mr. Marcy to represent my clients and complete the transaction with these parties, Dunn and Harris, carefully instructing him to avoid the purchase of any bonds of Mr. Shreve Ackley, as to the validity of whose holding I had come to entertain doubts. Satisfied as I was of the *bona fides* of the holding of the bonds, I authorized him to purchase. I, nevertheless, required him, as a condition precedent, to have each one of these parties make his affidavit that the bonds were purchased in good faith, and without any knowledge or suspicion of their integrity. I left Mr. Marcy to complete the transaction, and after a delay of a few days in Washington city returned to Jacksonville. The transaction had not been completed, according to the best of my recollection, when the sale of the road took place. After the property was cried off at Green Cove Springs and knocked down to J. C. Greeley as Trustee, I returned to Jacksonville by the next train. I ascertained that a number of these bonds—I cannot recollect how many—had been sent to Mr. Cooper's office to be filed. Mr. Marcy informed me that the bonds had been left in Mr. Cooper's office to be filed, but had not been filed by reason of the absence of the special master. I immediately closed the transaction with Mr. Marcy; told him I would take the bonds; went to Mr. Taliaferro's residence, where I found him at dinner; got his check for the amount to be paid, and handed it over to Mr. Marcy. He got the money on it, and went to Mr. Cooper's office and got the bonds; I don't recall whether it was Mr. C. P. or J. C. Cooper who turned them over to him. There were a number which he had in his safe and which had not been de-

livered to the office of the Messrs. Cooper. My impression is that none of them had been filed. I hold in my hand a telegram from Mr. Thomas S. Harris, addressed to Messrs. J. C. Marcy & Son, which I file. I know that a portion of the bonds purchased by me were handed to me out of his safe, but what number and denomination they were I do not know.

Paper is handed witness and he is asked if it is one of the affidavits referred to in his testimony.

A. This is one of the affidavits. It is not exactly according to the condition I prescribed to Mr. Marcy, and it is not the kind of an affidavit I would have taken myself."

(See page 203–4 of the record.)

It appears from the recorded proceedings in the State Court, made part of the pleadings in this case, that the suit of P. J. Canova *vs.* Green Cove Springs and Melrose Railroad Company, and the suit of Buddington, Wilson & Co. *vs.* the same, were consolidated by order of the Court in January, 1885, and on the 20th day of June, 1885, J. C. Cooper, as master, gave master's notice to creditors as follows:

"MASTER'S NOTICE TO CREDITORS.

"Notice is hereby given to all persons having claims of any character against the Green Cove Springs and Melrose Railroad Company, including bonds of said company, to file and prove the same before me at my office, in the city of Jacksonville, within sixty days, according to the decree of the Judge of the Circuit Court for Clay county, Florida, in the cases of Buddington, Wilson & Co. *vs.* Green Cove Springs and Melrose Railroad Company and P. J. Canova *vs.* Green Cove Springs and Melrose Railroad Company, bearing date the 4th day of June, A.D. 1885. JOHN C. COOPER.

"June 20th, 1885."

which was published for nine consecutive weeks prior to August 22d, 1885.

On pages 66 to 74 inclusive of the printed record will be found the report of the Special Master in the State Court, the Circuit Court for Clay county, Florida, showing all the debts, claims, bonds, judgments and liens of all sorts proven in the cases in that Court, to-wit: Sixty-six thousand 60-100 dollars

of the bonds filed and allowed, and other bonds of divers members of the Chester Construction Company disallowed, thirty-one in number, amounting to $31,000.

And the further proof that Dexter Hunter held $25,000 more of the bonds as collateral to protect his contract to complete the railroad construction for short distance, for which construction he was only paid by allowing him an interest in the purchase of the property under these proceedings by the master in said causes.

In addition to these bonds about $18,500 of laborers' liens and other like claims were filed with said master, adjudicated in said causes and entered into and became part and parcel of the title acquired by the purchasers at said sale.

So that the position the appellant, the Guarantee Trust and Safe Deposit Company, occupies in this litigation, is that of a naked trustee seeking to overturn a sale under which its own *cestuis que trust* hold the title to this property for the payment of their bonds.

The only bonds *bona fide* issued by the Green Cove Springs and Melrose Railroad Company were those filed and allowed in these causes in the State Court.

The bond account, page 219 of the printed record, which came into this record from the possession of J. T. Walker, attorney for Ambler & Taliaferro, while he was being examined as a witness, p. 205, shows the whole number of bonds to be $200,000; of these, $35,000 therein were stated to be in possession of H. K. Thurber; $11,500 held by R. B. Canova; $18,000 held by Buddington & Wilson, and $25,000 held by Dexter Hunter, were *bona fide* issued for value, and were allowed in the proceedings in the Circuit Court for Clay county, Florida; the other $25,000 therein stated as held by Shreve Ackley, and $85,000 by Chester Construction Company were never *bona fide* issued or held, nor was any consideration ever given for them, as is shown by the testimony before the master in the Circuit Court for Clay county, see pages 94, 95, 104 of record, and the findings of said master as to some of them on pages 71 and 72 of the record, and by the testimony of R. W. Davis, pages 186 to 190 of the record, and A. F. Vogelbach, pages 171 to 179 of record.

This evidence shows beyond doubt that the $85,000 held by the Chester Construction Company were obtained by them upon misrepresentations of the work that they would thereafter do, and the new equipment, etc., which they would furnish, but which they never furnished, but they failed to pay their subcontractors, Buddington, Wilson & Co., and P. J. Canova who did all the work that was done on the road, and the only compensation said Buddington, Wilson & Co., and Canova ever received was what they obtained by sharing in the purchase of the property under the sale by the Master on the proceedings in said State Court, which is assailed in this cause, so that clearly in the hands of any of this Chester Construction Company or of any one taking same with knowledge of the facts, these bonds were not *bona fide* outstanding liabilities against the Green Cove Springs and Melrose Railroad Company or liens on its property.

The history of the $25,000 held by Shreve Ackley, shows that they were *never issued at all*, but were held by him as *President of the company* to be put in bank subject to the orders of the company (see testimony of Vogelbach, page 171 of the record), and by him were intended to have been filled in the Master's office in the suit in the State Court, but were diverted from that cause and sold contrary to his instructions to Ambler & Taliaferro who here produce them in this cause in United States Circuit Court for Northern District of Florida.

See Vogelbach's testimony page 171 of record.

The court below dismissed the bill in this cause, thereby adjudicating that there were no outstanding bonds other than those allowed in the causes in the State Court, and which entered into the title in this cause, and we contend this adjudication is abundantly supported by the testimony in this cause.

The only bonds filed in this cause in United States Circuit Court for Northern District of Florida in pursuance of the order of the court found on page 162 of record, were those of Ambler & Taliaferro numbered 4, 17, 83 and 85 to 91 inclusive, for $500 each, numbers 18, 21, 22, 68, 124 to 128 inclusive, 131 to 134 inclusive, 137, 138, 140, 148 and 149, for $1,000 each, aggregating principal of $23,000.

The history of these bonds is given by the witness, A. J.

Vogelbach, on page 171 of the printed record, and discloses that $18,000 of them, to-wit: numbers 83, 85, 86, 87, 88, 89, 90, 91 of denomination of $500 each, and 124, 125, 126, 127, 128, 131, 132, 133, 134, 137, 138, 140, 148 and 149 of $1,000 each, "*were never issued* by the company at all, but were left by the company in Philadelphia with Shreve Ackley, the President of the company, and he sent them to one J. C. Marcy to file with the Master in the State Court, and said Marcy sold them to said Ambler & Taliaferro for a small nominal figure, contrary to his instructions, so Ackley states to Vogelbach, and of all these facts Ambler & Taliaferro had full and complete notice.

The other $5,000 of these bonds, filed by Ambler & Taliaferro, were bonds procured by the Chester Construction Company of New Jersey from said Green Cove Springs and Melrose Railroad Company, on covenants that said construction company never fulfilled, and by fraud and misrepresentations, and were sold by said J. C. Marcy to said Ambler & Taliaferro for one Dunn and one Thomas E. Harris, members of that Chester Construction Company, of all of which matters said Ambler & Taliaferro had full knowledge.

For history of bonds delivered to Chester Construction Company see testimony of A. J. Vogelbach, page 173, and particularly the testimony of R. W. Davis, who was the Secretary of the Green Cove Springs and Melrose Railroad Company during nearly all of its existence (see pages 186, 187 and 188 of printed record).

From this testimony it clearly appears that the bonds held by Shreve Ackley belonged to the Green Cove Springs and Melrose Railroad Company and were never issued, and those held by the Chester Construction Company were never earned, and were divided up among themselves, and that Thomas E. Harris and Dunn Brothers, from whom Ambler & Taliaferro purchased the bonds, were members of the Chester Construction Company.

Now as to Ambler & Taliaferro's connection with this railroad company, its history and bonded indebtedness.

It appears from the testimony of R. W. Davis, pages 187 and 188 of record, that after the Chester Construction Company

had failed to carry out their contract, that the Green Cove Springs and Melrose Railroad Company applied to Ambler & Taliaferro to advance them money or to make a contract to complete the road; and gave them a complete statement of the financial condition of the company and of its bonded debt, and who held the bonds and of the failure of Chester Construction Company to carry out its contract, of the nature of their holding of bonds.

In this statement they were distinctly informed of the nature of Ackley's holding, that is, that the bonds he held belonged to the company.

This was in the latter part of 1883 or early in 1884.

Ambler & Taliaferro did not advance the money, that was sought to be borrowed, but Dexter Hunter, one of the present owners of the railroad, did advance the funds, by means of which was completed the construction of the first ten miles.

The next we find of Ambler & Taliaferro's connection with the company or its bonds is, that after the road has gone into the hands of a Receiver, and the causes are pending in the State Court, they send their attorneys, J. T. Walker and J. C. Marcy, to Philadelphia to find out who hold the bonds and everything they could there in reference to these bonds.

See testimony of J. T. Walker, page 203 of record.

Also testimony of J. C. Marcy, page 195 of record.

Mr. J. P. Taliaferro and his attorney, Mr. J. T. Walker, went to the sale of the road made by the master, and came immediately back to Jacksonville, went after Marcy, who held the Ackley, Harris and Dunn bonds, got him to withdraw the bonds from the master's office, bought them for about 20 per cent. of their face value and then demanded payment of the same from the purchaser, J. C. Greeley, Trustee, and threatened this litigation, if they were not paid.

These facts appear from the testimony of J. C. Greeley, page 210 of record, testimony of J. T. Walker, page 203 of record, testimony of J. C. Marcy, page 193 of record, testimony of J. C. Cooper, page 182 of record.

The very manner in which the purchase was made, in a great hurry, immediately after the sale, for a small sum, with

the litigation pending, and the evidence already taken, showing the insolvency of the railroad company and its failure since July, 1883, to pay interest on bonds, go to show an utter recklessness on the part of these purchasers as to the character of the bonds they were buying.

In Mr. T. J. Walker's testimony, page 203 of record, it is clear he knew that the bonds held by Shreve Ackley were not *bona fide* held and the evidence of Vogelbach, page 171, shows $18,000.00 of these bonds bought by Ambler & Taliaferro to be part of the bonds held by Ackley, and the other $5,000.00 of said bonds so purchased were bonds by the Chester Construction Company.

We say, therefore, none of these bonds filed by Ambler & Taliaferro were *bona fide* outstanding and they knew it, and it must be borne in mind also that at the very time they were buying them, their attorney, J. T. Walker, had in his possession the papers and pleadings in these suits in State Court for examination, and necessarily knew all the history of these bonds disclosed in these pleadings. In this connection examine answer of Green Cove Springs and Melrose Railroad Company to bill of Buddington, Wilson & Co., in which the company fully admits its insolvency and inability to pay its bonds, and shows this condition was produced by the fraud and over-reaching of the Chester Construction Company.

When Mr. John T. Walker, attorney for Ambler & Taliaferro, examined the papers and files in the cases in State Court, before said purchase by them of the bonds from J. C. Marcy, he must have ascertained that this railroad company was insolvent and unable to pay the interest on its bonds; this insolvency is shown by the bill of P. J. Canova, page 2 of record, which states the insolvency of the company; it is also shown by the order appointing a receiver, page 7 of the record; the contract with Dexter Hunter, page 9 of record, and the distinct allegation to that effect in bill of Buddington, Wilson & Co., page 18 of record; testimony of O. A. Buddington, page 43 of record, and the decree of Circuit Court of Clay county, Florida, of June 4th, 1885, page 61 of record, in which the insolvency of this company is distintly found and adjudged by the said State Court, and the evidence

shows that the company had ceased to pay any interest on its bonds since July, 1883. See testimony of O. A. Buddington, page 43 of record, and said decree of court, page 61 of record.

This record further disclosed that the Chester Construction Company had obtained the bonds held by it by fraud and misrepresentation, and had no right or title to same; this is distinctly alleged in the answer of the company, page 32 of the printed record; the language is "respondent alleges that these bonds were obtained by said Chester Construction Company by misrepresentations and false promises, and that they are without adequate consideration." No stronger statement could be made of the fradulent character of the holding of said bonds by said Chester Construction Company. The bills of P. J. Canova and Buddington, Wilson & Co., alleging the failure of the Chester Construction Company, were on file, and the *pro confesso* against said Company; so that these records thus put in the possession of their attorney, thus specially charged by them with the investigation of this matter, fully advised Messrs. Ambler & Taliaferro of the condition of said Chester Construction Company, and its bad faith with the railroad company, as well as the tenure under which it held these bonds.

See testimony of J. C. Cooper, page 181 of record. See answer of Green Cove Springs and Melrose Railroad Company, in suit Buddington, Wilson & Co. *vs.* Green Cove Springs and Melrose Railroad Company, page 32 of record, also page 104 of record.

There were no other bonds filed in United States Circuit Court except these Ambler & Taliaferro bonds, but a petition was filed by H. K. Thurber claiming to have $35,000.00 other of the bonds, but he did not produce nor file the bonds for the reason that the bonds had already been filed in the State Court as the bonds of *P. J. Canova*, and are still in the custody of the State Court, and this with Mr. Thurber's full knowledge and approbation. The whole history of the filing of these bonds with the master in the State Court is given by J. C. Cooper, who was the master in these causes, on page 165 of the record.

H. K. Thurber sent the bonds to the master with a letter, found on page 219 of record, in which he makes no claim to own

the bonds or to have any interest in them, but says he sends them "for *account of R. B. Canova*, as per *his* request."

R. B. Canova came into the master's office and had the bonds filed as collaterals held by P. J. Canova, to secure a debt he held against the company for constructing part of the road, the bonds were so reported to the court and participated *pro rata* in purchase price of the railroad at the sale by the master under decrees in said causes in Circuit Court for Clay county, Florida.

See master's report, page 67 of record.

These bonds the evidence shows never did belong to A. K. Thurber, but were deposited by the Green Cove Springs and Melrose Railroad Company with *P. J. Canova*, as collateral to secure the amount due to him for constructing a portion of said railroad.

See resolution of the railroad company, page 94 of record. See testimony of J. C. Cooper, page 165 of record. Also testimony of R. B. Canova, page 167 of record. Also testimony of A. J. Vogelbach, page 173 of record. Also testimony of R. W. Davis, page 190 of record.

It also distinctly appears that after the company had assigned these bonds to P. J. Canova as collateral, that *R. B. Canova* sent them to H. K. Thurber simply to show Mr. Thurber that the construction party would be paid, and that the company had bonds with which to meet its liabilities. It was not by any action of the company or P. J. Canova that the bonds were sent to Thurber.

Davis took the bonds to Thurber at R. B. Canova's request, see page 190 of record, and Thurber returned them to the master at R. B. Canova's request; see page 219 of record.

R. B. Canova personally borrowed money from Thurber and gave him his individual notes, and sent him these bonds, but neither the company or P. J. Canova, to whom the company assigned the bonds, had any transaction with Thurber.

See testimony of R. B. Canova, page 168 of record. See testimony of Vogelbach, page 174 of record. See testimony of R. W. Davis, page 190 of record.

It thus appears:

1. That H. K. Thurber never had any title to these bonds.

2. He did not produce or file any bonds, as they were already in the State Court.

3. Thurber himself sent them to the master in State Court to be filed for benefit of R. B. Canova, and made no claim to them at that time.

4. The records of the railroad company and the evidence show these bonds were in fact issued to P. J. Canova, as collateral to secure him, just as the master found and reported in the said State Circuit Court. So that Thurber had no status as to these bonds before the United States Circuit Court below which dismissed the bill, and said Thurber's claim lent no aid whatever to the bill, and furnished no ground for relief to him or any one else under the bill.

It thus appears that, even if it be admitted that the proceedings in the State Circuit Court for Clay County, Florida, were defective or void, no case was presented by this evidence to warrant any decree but that of dismissing the bill, because all of the bonds filed, or attempted to be proven as claims, were either not *bona fide* claims against the said railroad company and its property, or were bonds to which said claimant, Thurber, had no title, legal or equitable.

The statement in the brief of appellant's counsel as to the status of Thurber bonds is not sustained by the testimony.

If Thurber ever had any title to these bonds, he voluntarily relinquished it by his letter to the master, accompanying them with a letter stating: "He sent them for account of Mr. R. B. Canova, as per his request."

There is no evidence whatever showing any direction by him to either Canova to file them for Thurber. He relinquished any right he had in them in favor of R. B. Canova, who filed them for P. J. Canova, *to whom the company had issued them as collateral.* P. J. Canova had a large claim greatly in excess of the Thurber loan to R. B. Canova, and he, P. J. Canova, had more right in these bonds than Thurber ever had.

When appellant speaks of fraudulent appropriation of the bonds, it is sufficient to reply the bonds were filed just as Thurber directed and paid *pro rata* to a man who had larger interest in

the bonds, representing labor and expenditures, than Thurber's loan.

If P. J. Canova committed larceny of the bonds, he was guilty of larceny of his own property and consented thereto by Thurber, but the facts are after Thurber sent the bonds to the master he had no interest whatever in them as far as the record discloses.

There is no evidence whatever that R. B. Canova acted for P. J. Canova in leaving these bonds with Thurber, as contented by appellant, and no evidence that Thurber sent the bonds to the master expecting *himself* to share in proceeds of said sale, except his own statement long after the transaction. Thurber had R. B. Canova's notes, and the record, page 248, shows he sued upon those notes. But Thurber's own letter settles the matter; he filed the bonds for *Canova* and so they were applied.

There are some erroneous statements in appellant's argument which we call attention to. It is stated that the suits of P. J. Canova and of Buddington, Wilson & Co., were brought on the erroneous idea that they, as *contractors*, had a lien on this property. The bill or Buddington, Wilson & Co. was in the main upon the *bonds* they held, both those they had title to and those they had as collateral. See page 17 of printed record.

The bill of Canova shows that the directors of this railroad company, by resolution, made a contract with him and refers to the resolution, which resolution is found on pages 94 and 95 of record, which *resolution pledges the bonds of the company to secure him, so that his bill did fix his* status as having a pledge of *bonds* to secure *his contract.*

The appellant seeks to show that the order of publication commenced to run on the 9th of August by stating that the affidavit of the publisher shows that it was published weekly. There was no statement in the affidavit that it was published weekly. The statement was that it was published for nineteen consecutive weeks. And the appellant also contends that the proof shows that the paper was published on each Saturday. The proof as to that, in the testimony of Buddington, is very uncertain.

The appellant then attempts to figure out that the first publication must have been on the 9th of August, but neither of the

facts from which he derives his conclusion are shown in the proof. Therefore he has nothing to base it upon, if it were allowable against a decree of a court finding four months' publication.

The appellant admits the weakness of this argument by stating in his brief, page 7 in a note, that the original in the court below showed by the printer's marks that the first publication was on the 9th of August. There is no such paper in this record and appellant cannot supply alleged defects of record by statements in his brief. If there was any such original the proper means should be taken to produce it before the court as a part of the record in the case; but we say in reply, that without some evidence *de hors* the original itself to explain what the alleged marks mean, they do not in themselves show what the appellant states.

Appellant makes one of his assignments of errors the fact that the order appointing the master in the United States Circuit Court, Northern District of Florida, in this case did not make it mandatory upon the holders of bonds to file their bonds with him, and appellant endeavors to sustain this on page 24 of his brief by again referring to an alleged paper, and parts of a paper stricken out as originally written, none of which appear in this record, and of course cannot be considered by this court.

The order appointing the master, page 162 of the printed record, states that he was appointed "on motion of complainant." If the reference was not full enough it was the fault of the complainant, but the reading of the order will show that it was ample, to give every bondholder an oppertunity to come into the case. The order required him to give notice in a newspaper of general circulation to the bondholders and to mail a copy of the paper to any person whom he might know or ascertain had bonds, so that there cannot be any force in this objection.

Again it will be noted in the final decree in this cause, page 248 of the printed record, that the case "was submitted for final *decree* upon the pleadings and evidence as reported by the Master" so that appellant cannot raise any objection as to the lack of proof.

Appellees submit that none of the alleged errors urged by appellant exist, and the decree of the court below should be affirmed.

J. C. Cooper
Sol. for Appellees

IN THE

Supreme Court of the United States.

October Term, 1890.

THE GUARANTEE TRUST AND SAFE DEPOSIT COMPANY, Appellant,
vs.
THE GREEN COVE SPRINGS & MELROSE RAILROAD COMPANY, ET AL, Appellees.
} No. 155.

Petition by Appellees for Rehearing.

To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

The appellees respectfully petitioning for a rehearing in the above stated cause, desire to suggest to this Honorable Court certain matters in the Opinion of this Honorable Court in said cause, which petitioners deem to be misapprehensions of fact, and misapplications of law therein.

Petitioners in this petition follow the numbering of the divisions of the Opinion as numbered in said Opinion.

I.

In Florida both the possession and the legal title remain in the mortgagor or debtor, who can be de-

prived of neither under the deed or contract except by a judicial sale. Therefore, the taking possession and sale provided in this trust deed at the request of the holders of 60 per centum of the outstanding bonds must have referred to a taking possession and sale under and in pursuance of chancery proceedings; no other was possible, under the laws of Florida. The reasoning of the Court, in the light of the Florida Statutes and decisions on mortgages and trust deeds, sustains the contention of appellees that the request of the holders of sixty per centum of the bonds was necessary.

See McClellan's Digest Laws of Fla., 765.
Jordan vs. Sayre, 24 Fla., 9.

II.

1. The purpose of the bill of Buddington, Wilson & Company was not only to enforce a statutory lien or the collection of bonds held as *collateral*, but the gravamen of the bill was to enforce by sale of the mortgaged property the collection of *all* outstanding bonds of the company secured by this trust deed, in the words of the bill itself, also that the proceeds of the sale be applied "*pro rata* to the payment of what may be due to your orators on their said bonds and such other *bona fide* holders of the first mortgage bonds of said railroad company as may come in and present their bonds and share in the costs and expenses of this suit; and that the said railroad company and the said Guarantee Trust and Safe Deposit Company may be required to furnish a statement showing what bonds of the said road have been issued, giving their numbers and amounts, to whom issued and for what consideration." (Record 17–19, paragraphs 3 to 8, and prayer.)

This being the purpose of the bill, no prayer for foreclosure or decree of foreclosure according to the English Chancery practice was necessary; a mortgage in Florida being but a lien to be enforced by a judicial sale of the premises.

2. Such being the said purpose of the said bill, as above stated, it is not material whether appellant was duly served by publication or not, because all of its *cestuis que trustent*, the bondholders, were invited to come into this suit of Buddington, Wilson & Company and participate in the proceeds of the sale.

The suit was by one of a class of lien holders for the benefit of all, and an opportunity was given them all so to participate; they are therefore all *quasi* parties to said suit, and appellant, as their trustee, being but a naked trustee, is bound by the proceedings in that suit.

Campbell vs. R. R. Co., 1 Wood's Rep., 376, 377.

That such opportunity was given to participate in the proceeds of sale under said bill is shown from the fact that the only bonds filed in this suit, to-wit, of Ambler & Taliaferro, were withdrawn from the Master's office in Circuit Court for Clay county, Florida, just preceding their sale to Ambler & Taliaferro, the party depositing them in said Master's office evidently intending to participate in the proceeds of that sale if it suited him.

3. The opinion holds that the seizure of the *rem* did not give jurisdiction, because the order of consolidation of the suits brought by P. J. Canova and Buddington, Wilson & Company was made after the decree *pro confesso* was attempted to be entered against appellant in the suit of Buddington, Wilson & Company, and appellant was not a party to the suit of Canova in which the receiver was originally appointed.

We respectfully call the Court's attention to the fact that the Buddington, Wilson & Company's bill sets forth, paragraph 9, that the railroad is in the hands of the Receiver under the Canova suit, and prays that the possession of said Receiver be continued. The Buddington, Wilson & Company bill thus adopts this status of the Court's custody through its proper officer, and this possession of the *rem*, so seized from the *Railroad Company*, who held the legal title and prior possession, and so adopted by Buddington, Wilson & Company in their suit, continued from the beginning of the Canova suit, and before and after the consolidation of the Canova and Buddington, Wilson & Company suits, until the sale was made by the Court, gave the Court complete jurisdiction of the *rem*.

In this connection, we respectfully ask the Court's attention to the opinion of Mr. Justice Field in Pennoyer vs. Neff, 95 U. S., 734, quoted by appellees in their brief, but not discussed by the Court in its opinion.

III.

While attempting to state as briefly as we may the foregoing suggestions, we would urge more particularly what we conceive to be misapprehensions of patent fundamental facts upon which the judgment of reversal depends.

A. "The bonds belonged originally to Thomas S. Harris." (Opinion.)

On the contrary, the admitted facts are that he obtained them from the president of the railroad company, and from the construction company; there is no evidence that he obtained them either for value, or without notice; and the only testimony on the point shows that he had notice of the fact that these parties could not give good title.

B. "Marcy swears in this connection that he sold $23,000.00 face value of the bonds to Walker as agent of the purchasers, *and was paid that amount of money.*" (Opinion.)

On the contrary, for these bonds, $23,000.00 face value, without considering the unpaid past due coupons attached, the agent received only $3,450.00.

C. "The only fact relied upon to show want of good faith, appears to be that these bonds were sold upon the day of the sale of the railroad property under a decree of the State court, and after the parties attending the sale, including Walker the agent of the purchasers, had returned from Green Cove Springs, where the sale was had, to Jacksonville." (Opinion.)

The appellees, on the contrary, relied on numerour uncontested facts, on facts also clearly determined by inference from admitted facts, and further upon the decree of the Circuit Judge, sitting with the District Judge, determining, after consideration of the merits, there were no *bona fide* bonds outstanding, which we submit the status of the pleadings indicates even though no opinion was filed. The appellees' brief (pp. 24 to 35) attempts to set forth by repetition and by reference sufficient of the record testimony to support the finding and decree of the Circuit Court on this question of *bona fides.* And we beg leave to repeat, in short paragraphs, certain parts of the evidence:

The appellant's brief, while seeming to claim that Harris may have obtained title to $5,000.00 of bonds, admits in effect that he did not have title to the $18,000.00, and the argument proceeds wholly on the theory that, notwithstanding the defects in Harris' holding, Ambler & Taliaferro acquired title by purchase for value without notice.

Harris Never Owned the $18,000.00 of Bonds.

These bonds are identified (Vogelbach 171, 8th line) as being deposited in the custody of the president, simply as a custodian, with no authority to issue them (Davis 189, middle of page), and they *were never issued* (Vogelbach 171, 7th line). This evidence is wholly uncontested and unaffected.

Harris was familiar with the affairs of the railroad company, as shown by his consultation with the officers of the railroad company, when they were in Philadelphia consulting with him and the president, Shreve Ackley, residing there; by his active participation in the stockholders' meeting in Florida (Vogelbach 176; Davis 189); and by his unauthorized sale of the bonds, see testimony elicited by the question of ~~defendants~~ plaintiff's counsel (175 and 218): He, Harris, was better posted about the affairs than I, the president, was. I, the president, was surprised and said, Why, I gave no orders to sell the bonds.

Whatever favorable inferences this testimony may admit, it would at least put a business man on notice, and the information which ordinary inquires would readily elicit, defeats the idea of Harris' *bona fides*, A claim which is not here advanced by the appellant.

Harris Never Owned the $5,000.00 of Bonds.

These bonds Harris obtained from the Chester Construction Company (Vogelbach 171). The fact is not contested. (Appellant's brief 18, line 8).

Harris was one of the members of this Construction Company, and was entrusted with the management of its affairs (Davis 189) in connection with the

Railroad Company. Harris must be presumed therefore to know of the Construction Company's failure to earn these bonds, which is duly proven herein (Vogelbach 173, 7th line, *et seq.;* Davis 189-190), and not contested or contradicted. The appellant claims that the Construction Company did certain work, but it does not follow that thereby a proportionate amount of bonds was earned, or even that the Railroad Company was benefited thereby, and the testimony directly contradicts any inference tending to show any of these bonds were earned.

Harris therefore could not obtain title to these $5,000.00 of bonds.

Ambler & Taliaferro Were Not Innocent Purchasers.

The opinion seems to proceed on the idea, and the fact is shown by the record, that the knowledge of Walker and also of Marcy was in law the knowledge of Ambler & Taliaferro. A number of facts are proven to have come to the knowledge of these parties, or to some of them, sufficient to reveal the invalidity of title, or at least to put an ordinary business man on notice.

1. The bonds, with past due coupons attached, were offered for sale and bought at about 15 per cent. of the original face value (Marcy 195). To some of these bonds were attached three past due coupons, to others only one or two, and from some even immatured coupons had been detached. (Record 251-253).

2. These bonds were not purchased long before the sale as indicated by Walker's testimony (203), for Marcy was negotiating with different parties until the

day of the sale (217, 14th line). The purchase was made therefore just after the sale of the road while these bonds or some of them at least were actually in the master's safe. (203, 17th line from bottom, 181, 183 top, 207). The purchase of these bonds by Ambler & Taliaferro was made in great haste and in a reckless manner, and for the *avowed* purpose of *coercing the purchaser, Greeley*, into a settlement with them under a threat of a suit on these bonds. (Greeley 210, Cooper 182).

3. Walker the agent in this matter of Ambler & Taliaferro (Taliaferro 205), testifies that "without any *knowledge* or suspicion of their integrity" (203) he required the vendor to make affidavit of good faith. But he admits the affidavit furnished was not above suspicion (204 top), and the affidavit itself (219 middle) shows, besides peculiarities in wording, that the numbers, amount, or other identification was not in the body of the affidavit, and the marginal numbers may for ought shown to the contrary have been added after the affidavit or by some one without affiant's knowledge. Indeed, Marcy testifies (191) there were two affidavits accompanying two different packages of bonds received from Harris at different times, and yet the one affidavit introduced (219), has following it the numbers of all the bonds purchased including both packages.

4. The opinion of the Court quotes the opinions of these parties whose innocence is in question, to the effect that they were innocent. This is not only insufficient, but we even considered it improper testimony, (Counsel's objection, Record 202) We submit the Court's opinion should be based rather on the actual facts known to these parties or to any of them, and their failure to testify to exactly what they had heard and seen, instead of their conclusions, is in itself indicative of fatal knowledge.

5. One of these parties states, (Walker 202): "My investigation satisfied me that there were a number of bonds outstanding of this Company which were of *doubtful validity* as liens. I ascertained as near as I could where all the bonds were. My principal source of information was through the officers of the road." This being the principal source of information, and it being nowhere denied that the officers told them what they testify to here about the status of the bonds held by the president and by the Construction Company, it necessarily follows that these parties base their opinion of innocence on facts which in law do not sustain it.

6. These agents, Walker and Marcy (191, 194, 14th line *et seq.*, 181-2), had investigated all the pleadings and testimony in the litigation under which the road was sold, and consulted the master therein at different times. In those pleadings it was alleged (32 middle of page) that the Construction Company bonds were without consideration, the master reported adversely to the bonds produced by Johnson, Applegate and others (71-2), associates of Harris in the Construction Company (Davis 190 4th line), on the ground that these bonds were of those obtained by the Construction Company (72); and the Court then decreed, upon the exceptions to the master's report by these parties (75 bottom), that these bonds were void.

7. Walker, the purchasing agent (205, see his list of bonds 219), knew where and by whom the bonds were held; and as stated above he was familiar with the State Court litigation wherein (Master's report 70-3), all the bonds were accounted for except those in the hands of the president, Shreve Ackley, and some of those obtained by the Construction Company. Walker therefore knew these bonds came

from either one or both these discredited sources, if any doubt can be indulged on this subject after his trip to Philadelphia (203), and his information from the officers of the road (202).

8. Admitting the utmost innocence to be claimed, such confessed doubts, and such knowledge, were sufficient to put an ordinary business man on inquiry, and it would have been easy for them to have inquired of these officers so ready to give information, as to whether these particular bonds were of those held by the president, Shreve Ackley, or by the Construction Company, and failure to make such inquiries under these circumstances is fatal to the claim of *bona fides*. "The means of knowledge and knowledge itself are in legal effect the same thing." *Jones vs. Guaranty Co.*, 101 U. S., 633 top.

The Court in its opinion further says: "There is sufficient to see that there are bonds outstanding to secure this mortgage upon which plaintiff is entitled to maintain his bill, and it is not necessary at this stage of the case to determine as a finality, the amount, validity or ownership of such bonds or the number which are held bona fide by the present holders."

This language leaves in doubt the title of Ambler & Taliaferro to the bonds filed by them, and does not indicate what the bonds are the Court refers to as "outstanding." We submit that the Circuit Court should not be permitted to be in doubt on this question.

We have, in attempting to condense this petition, omitted a large amount of testimony militating against the *bona fides* of the Ambler & Taliaferro purchase; and have referred most briefly to the matters mentioned.

If the Court should grant a rehearing, we would beg leave to go into a full discussion of the whole matter, unless the Court should by its order confine the argument to particular points.

Wherefore, respectfully petitioning, your petitioners humbly pray a rehearing of this cause.

J. C. Cooper

Attorney for Appellees Petitioning.